

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1	JAVIER FLORES,	)	No. C 05-3932 CW (PR)
2		)	
3	Petitioner,	)	ORDER GRANTING IN FORMA PAUPERIS
4		)	STATUS ON APPEAL, DENYING MOTION
5	v.	)	FOR RECONSIDERATION AND GRANTING
6	A.P. KANE, Warden,	)	CERTIFICATE OF APPEALABILITY
7	Respondent.	)	(Docket nos. 22, 23)
8	_____	)	

9       Petitioner, proceeding pro se, filed a petition for a writ of  
10 habeas corpus pursuant to title 28 U.S.C. § 2254. On March 14,  
11 2008, the Court granted Respondent's motion to dismiss the petition  
12 as untimely. On March 24, 2008, Petitioner filed a notice of  
13 appeal. On April 14, 2008, he filed an application to proceed in  
14 forma pauperis (IFP) on appeal. On May 30, 2008, he filed a motion  
15 for reconsideration. Respondent filed an opposition to  
16 Petitioner's motion for reconsideration on June 25, 2008. On  
17 November 10, 2008, Petitioner filed an "addendum" to his motion for  
18 reconsideration.

19       I. Motion for Reconsideration

20       Federal Rule of Appellate Procedure 4(a)(4)(A)(vi) provides  
21 that a district court may retain jurisdiction after a notice of  
22 appeal is filed if a petitioner files a motion "for relief under  
23 Rule 60 [and] if the motion is filed no later than 10 days  
24 (computed using Federal Rule of Civil Procedure 6(a)) after the  
25 judgment is entered." Fed. R. App. P. 4(a)(4)(A)(vi).

26       In the present case, Respondent argues that Petitioner's  
27 motion for reconsideration of the March 14, 2008 Order Granting  
28 Respondent's Motion to Dismiss is untimely because it was not filed

1 within ten days of the judgment being entered. Instead, Petitioner  
2 filed it over two months after entry of judgment. Petitioner also  
3 filed his motion for reconsideration after filing his notice of  
4 appeal. Thus, Respondent also argues that "the Notice of Appeal  
5 divested this Court of jurisdiction to substantively address the  
6 Motion." (Opp'n to Mot. for Recons. at 2.)

7 Because the notice of appeal was filed before the motion for  
8 reconsideration, this Court lacks jurisdiction to rule upon  
9 Petitioner's motion. See Scott v. Younger, 739 F.2d 1464, 1466  
10 (9th Cir. 1984). To seek Rule 60(b) relief during the pendency of  
11 an appeal, the proper procedure is to ask the district court  
12 whether it wishes to entertain the motion, or to grant it, and then  
13 move the court of appeals, if appropriate, for remand of the case.  
14 Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004). A  
15 district court lacks jurisdiction to rule on a Rule 60(b) motion  
16 filed after a notice of appeal unless this procedure "to revest the  
17 district court with jurisdiction to consider [the] Rule 60(b)  
18 motion" is followed. Id.

19 In any event, however, Petitioner's motion has no merit.

20 Motions to reconsider a decision of the court are  
21 appropriately brought under Rule 59(e) or Rule 60(b) of the Federal  
22 Rules of Civil Procedure. Fuller v. M. G. Jewelry, 950 F.2d 1437,  
23 1422 (9th Cir. 1991). Pursuant to Rule 59(e), reconsideration may  
24 be appropriate where the movant demonstrates that there is (1) an  
25 intervening change in the controlling law, (2) new evidence not  
26 previously available, or (3) a need to correct a clear error of law  
27 or to prevent manifest injustice. School Dist. No. 1J, Multnomah  
28 County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993),

1 cert. denied, 512 U.S. 1236 (1994). Rule 60(b) provides for  
2 reconsideration only upon a showing of: (1) mistake, inadvertence,  
3 surprise or excusable neglect; (2) newly discovered evidence which  
4 by due diligence could not have been discovered before the court's  
5 decision; (3) fraud by the adverse party; (4) the judgment is void;  
6 (5) the judgment has been satisfied; or (6) any other reason  
7 justifying relief. See Fed. R. Civ. P. 60(b); School Dist. No. 1J,  
8 5 F.3d at 1263. Subparagraph (6) requires a showing that the  
9 grounds justifying relief are extraordinary; mere dissatisfaction  
10 with the court's order or belief that the court is wrong in its  
11 decision are not adequate grounds for relief. See Twentieth  
12 Century - Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir.  
13 1981).

14 Here, as grounds for reconsideration, Petitioner claims that  
15 he "discovered a clear error that entitles him to relief." (Mot.  
16 for Recons. at 2.) He argues that his petition is "timely under  
17 the 'mailbox rule.'" (Addendum at 2.) He alleges that he signed  
18 his federal petition on August 14, 2005 and gave it to prison  
19 officials to be processed on that date. However, his petition was  
20 not file-stamped by the Clerk of Court until September 28, 2005.

21 Under the "mailbox rule," a pro se federal habeas petition is  
22 deemed filed on the date it is delivered to prison authorities for  
23 mailing. See Saffold v. Newland, 250 F.3d 1262, 1268 (9th Cir.  
24 2001), vacated and remanded on other grounds, Carey v. Saffold, 536  
25 U.S. 214 (2002) (holding that a federal or state habeas petition is  
26 deemed filed on the date the prisoner submits it to prison  
27 authorities for filing, rather than the date it is received by the  
28 courts).

1 In its March 14, 2008 Order, the Court found that Petitioner  
2 failed "to make a claim or showing that the date he signed the  
3 petition was the date of delivery to prison officials for mail."  
4 (Mar. 14, 2008 Order at 2.) The Court further stated, "Such a  
5 claim is especially important here because forty-five days elapsed  
6 between the date the petition was signed and the date it was  
7 filed." (Id.) The Court deemed the petition filed as of September  
8 23, 2005, three court days before the date of filing, because it  
9 assumed "that Petitioner did not give his petition to prison  
10 officials for mailing on August 14, 2005 in light of his equitable  
11 tolling argument requesting the Court to toll the statute of  
12 limitations for the thirty-six days the prison law library was  
13 closed during August and September, 2005." (Id. (citing Opp'n at  
14 4-5).)

15 Petitioner states that in his opposition to the motion to  
16 dismiss, he "focused on the wrong point," and "sought to establish  
17 timeliness through equitable tolling rather than just focusing on  
18 when he delivered his legal documents to his Counselor." (Addendum  
19 at 2.) He states, "To the best of [his] recollection, on or about  
20 August 14, 2005, [he] gave [his] writ to Counselor Heinly for  
21 processing." (Pet'r Decl. ¶ 2.) He adds, "It appears there is no  
22 log to record receipt of the legal mail. The only record is for  
23 outgoing legal mail. The mail room indicates they forwarded [his]  
24 writ to the court on September 27, 2005." (Id. ¶ 4.) Petitioner  
25 alleges that Counselor Heinly "took the writ to the Trust Account  
26 Office for them to cut the \$5.00 filing fee and to sign the in  
27 forma pauperis form." (Mot. for Recons. at 2.) Petitioner states,  
28 "Apparently the Trust Office set [sic] on the writ for a couple of

1 weeks before fulfilling their duties and mailing the writ to the  
2 court." (Id.) In support of this statement, Petitioner cites  
3 Counselor Heinly's declaration. However, no such declaration is  
4 attached to the motion. Petitioner alleges that Counselor Heinly  
5 initially "agreed to wrote a declaration indicating that he had  
6 taken possession of the writ on August 14, 2005." (Addendum at 2.)  
7 However, Counselor Heinly "retracted his offer to write a  
8 declaration and informed Petitioner that he should ask the Trust  
9 Office for a copy of the original trust withdrawal form with the  
10 signatures and dates on it." (Id.) Petitioner claims he tried to  
11 obtain the trust withdrawal form; however, the trust office  
12 "indicated that their records had been 'purged' and therefore they  
13 were unable to provide a copy of the trust withdrawal form." (Id.)  
14 The record contains a document entitled, "Check Status Update,"  
15 which indicates that \$5.00 was taken from Petitioner's account on  
16 September 23, 2005 and sent to the Court. (Addendum, Attach.  
17 "Check Status Update" dated Oct. 14, 2007.) Also in the record is  
18 the receipt for the \$5.00 filing fee from the Clerk of the Court  
19 dated September 28, 2005. (Addendum, Attach. "Receipt for Payment"  
20 dated Sept. 28, 2005.)

21       Upon considering the alleged "clear error" presented in  
22 Petitioner's motion for reconsideration, the Court finds that  
23 Petitioner has failed to show that reconsideration of the Court's  
24 March 14, 2008 Order is appropriate. The Court found the petition  
25 to be untimely by seventeen days, and Petitioner has filed this  
26 motion for reconsideration to account for forty-five days that he  
27 claims should have been tolled pursuant to the mailbox rule.  
28 However, the record does not support Petitioner's allegations.

1 Instead, the record supports the Court's conclusion that the  
2 petition should be deemed filed as of September 23, 2005 because  
3 that was the date the trust office sent his \$5.00 filing fee to the  
4 Court. (Addendum, Attach. "Check Status Update" dated Oct. 14,  
5 2007.) Given the failure of Petitioner's argument that his  
6 petition is timely, the motion to reconsider would not be granted  
7 if this Court had jurisdiction to consider it.

8 In view of the above considerations, the motion to reconsider  
9 is DENIED on the merits as well as for lack of jurisdiction. A  
10 remand for ruling is not necessary.

11 II. Motion for a Certificate of Appealability (COA)

12 Petitioner did not seek a COA, however, the Court will  
13 construe his notice of appeal as a request for COA on all of the  
14 claims raised in his habeas petition. See United States v. Asrar,  
15 116 F.3d 1268, 1270 (9th Cir. 1997) ("If no express request is made  
16 for a certificate of appealability, the notice of appeal shall be  
17 deemed to constitute a request for a certificate.")

18 A petitioner may not appeal a final order in a federal habeas  
19 corpus proceeding without first obtaining a COA. See 28 U.S.C.  
20 § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an  
21 appeal of a final order entered on a procedural question antecedent  
22 to the merits, for instance a dismissal on statute of limitations  
23 grounds. See Slack v. McDaniel, 529 U.S. 473, 483 (2000).

24 "Determining whether a COA should issue where the petition was  
25 dismissed on procedural grounds has two components, one directed at  
26 the underlying constitutional claims and one directed at the  
27 district court's procedural holding." Id. at 484-85. "When the  
28 district court denies a habeas petition on procedural grounds

1 without reaching the prisoner's underlying constitutional claim, a  
2 COA should issue when the prisoner shows, at least, that jurists of  
3 reason would find it debatable whether the petition states a valid  
4 claim of the denial of a constitutional right and that jurists of  
5 reason would find it debatable whether the district court was  
6 correct in its procedural ruling." Id. at 484. As each of these  
7 components is a "threshold inquiry," the federal court "may find  
8 that it can dispose of the application in a fair and prompt manner  
9 if it proceeds first to resolve the issue whose answer is more  
10 apparent from the record and arguments." Id. at 485. Supreme  
11 Court jurisprudence allows and encourages federal courts to resolve  
12 the procedural issue first, as the Court does here.

13 The Court has reviewed its Order Granting Respondent's Motion  
14 to Dismiss. The petition was dismissed because the statute of  
15 limitations deadline was July 22, 2004, this petition was not filed  
16 until September 23, 2005, and Petitioner's arguments against  
17 dismissal -- that circumstances warrant statutory<sup>1</sup> and equitable  
18 tolling to save the petition from being untimely -- were

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20 <sup>1</sup> The Court found that statutory tolling did not alone overcome  
21 the time bar to Petitioner's federal petition, stating:

22 The one-year limitations period which began running  
23 against Petitioner on July 22, 2003 was tolled by the  
24 filing of his state habeas petition in the California  
25 Supreme Court on June 2, 2004, which is a period of 317  
26 days. The statute resumed running on July 20, 2005, the  
27 date of the California Supreme Court denial, and ran until  
28 September 23, 2005, the date Petitioner's federal habeas  
petition was deemed filed, which is sixty-five additional  
days. Therefore, a total of 382 days (317 days plus 65  
days) had elapsed before Petitioner filed the present  
petition in federal court on September 23, 2005.  
Therefore, his petition is untimely because it was filed  
seventeen days (382 days minus 365 days) after the  
limitations period expired.

(Mar. 14, 2008 Order at 5-6 (footnote omitted).)

1 unavailing. As mentioned above, the Court also found that nothing  
2 in the record supports Petitioner's allegation that he delivered  
3 his petition to prison officials for mailing on August 14, 2005;  
4 thus, he does not benefit from forty-five additional days under the  
5 "mailbox rule." Based on the record evidence, a court could  
6 resolve the issue involving the "mailbox rule" in a different  
7 manner than this Court and find the petition to be timely. Because  
8 jurists of reason would find debatable or wrong the Court's  
9 conclusion that the petition is untimely, the request for a COA is  
10 GRANTED.

11 CONCLUSION

12 For the foregoing reasons,

13 1. Leave to proceed IFP on appeal (docket no. 22) is  
14 GRANTED.

15 2. Petitioner's motion for reconsideration (docket no. 23)  
16 is DENIED.

17 3. Petitioner's motion for a COA is GRANTED.

18 4. The Clerk of the Court shall process the notice of  
19 appeal.

20 5. This Order terminates Docket nos. 22 and 23.

21 IT IS SO ORDERED.

22 DATED: 3/10/09

23   
CLAUDIA WILKEN  
24 United States District Judge  
25  
26  
27  
28



UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

FLORES,

Plaintiff,

v.

et al,

Defendant.

Case Number: CV05-03932 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 10, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Javier Flores C44235  
Correctional Training Facility  
P.O. Box 689  
Soledad, CA 93960-0689

Dated: March 10, 2009

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk

United States District Court  
For the Northern District of California